

The Burger Court Opinion Writing Database

Youngberg v. Romeo

457 U.S. 307 (1982)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University in St. Louis
Forrest Maltzman, George Washington University



Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

January 13, 1982

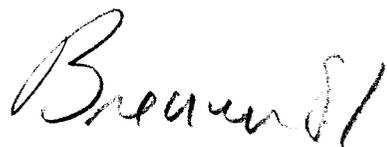
MEMORANDUM TO THE CONFERENCE:

Re: No. 80-1429 - Youngberg v. Romeo

The above could well have been set back-to-back with No. 80-1417, Mills v. Rogers. Since I overlooked that the next best thing is to discuss them together. (Each involves a good bit of "insanity"!)

Accordingly, I suggest discussion of Youngberg be laid over until Friday's conference.

Regards,



Supreme Court of the United States
Washington, D. C. 20543

May 10

CHAMBERS OF
THE CHIEF JUSTICE

June 8, 1982

Re: No. 80-1429 - Youngberg v. Romeo

Dear Lewis:

① ✓ I am concerned about some of the revisions you have made in the 4th draft of your opinion in this case. I agreed with your earlier drafts, that "involuntarily-committed mentally retarded persons do not have a constitutionally protected liberty interest in training per se." 3rd Draft, at 13. Now, however, although you purport to avoid the issue, the opinion states that "[a] court properly may start with the generalization that there is a right to minimally adequate training," 4th draft at 11, n. 24--defined loosely as such training as is "reasonable in light of identifiable liberty interests and the circumstances of the case," id. see also id., at 14.

② I fear that such a vague standard may subject numerous professional training and treatment decisions to intrusive scrutiny, and "second guessing," by the federal courts. You give some credence to this possibility when you suggest that Romeo's proffered expert testimony--indicating that "additional training programs, including self-care programs, were needed to reduce [his] aggressive behavior," 4th draft, at 10--might suffice to establish a violation of the "right" to "minimally adequate training." Although you later state that reviewing courts must "show deference to the judgment exercised by a qualified professional," 4th draft, at 14, I think further clarification may be required at pages 10-11 of the 4th draft.

③ Further explanation may also be in order as to why the case is being remanded, presumably for a new trial. 4th Draft, at 17. For example, the District Court instructed the jury that it should find petitioners liable if they "were aware of and failed to take all reasonable steps to prevent repeated attacks upon Nicholas Romeo." See 4th Draft, at 4. Certainly if petitioners took "all reasonable steps" to prevent such attacks, they did not deprive Romeo of his rights to "reasonably safe conditions" and to such training as was necessary to achieve reasonable safety.

While this instruction may have been undercut by the District Court's other instructions concerning the "deliberate indifference" standard, see id., this is never discussed in your opinion. The mere fact that the trial court referred to the Eighth Amendment instead of the Fourteenth Amendment would not mandate a new trial if the jury was otherwise instructed on a proper theory of liability. I think the District Court deserves more guidance.

you
may
have
point.

Finally, I have the following more minor concerns:

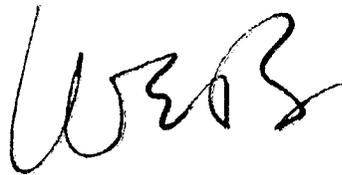
(a) At page 2, n. 3, you refer to Romeo as having been "incarcerated" in Pennhurst. This term seems inappropriate here; he is not really "incarcerated."

(b) At page 9, n. 19, you "decline to consider" respondent's claim that because state law creates a right to "care and treatment," he therefore has a federal substantive right to such "care and treatment" under the Due Process Clause. This loses me. The claim to a federal right to have some state right enforced seems to me so obviously without merit that it should either be rejected or not mentioned.

*I do
say
this.*

If every state right is federally enforceable, the line between state and federal courts vanishes.

Regards,



Justice Powell

P.S. Can't we find an easier way to make a living!?

Mar 1 - Show Me
Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

June 9, 1982

Re: No. 80-1429 - Youngberg v. Romeo

Dear Lewis:

The simple solution will be for me to join
in the judgment in this case.

Regards,

WJP

Justice Powell

To: Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: The Chief Justice

Circulated: June 11, 1982

No. 80-1429 - Youngberg v. Romeo

CHIEF JUSTICE BURGER, concurring in the judgment.

I agree with much of the Court's opinion. However, I would hold flatly that respondent has no constitutional right to training, or "habilitation," per se. The parties, and the Court, acknowledge that respondent cannot function outside the state institution, even with the assistance of relatives. Indeed, even now neither respondent nor his family seek his discharge from state care. Under these circumstances, the State's provision of food, shelter, medical care, and living conditions as safe as the inherent nature of the institutional environment reasonably allows, serve to justify the State's confinement of respondent. The State did not seek to confine respondent; his family understandably sought the State's aid to meet a serious need.

To: Justice Brennan
 Justice White
 Justice Marshall
 Justice Blackmun
 Justice Powell
 Justice Rehnquist
 Justice Stevens
 Justice O'Connor

From: **The Chief Justice**

Circulated: JUN 14 1982

Recirculated: _____

Printed
 1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 80-1429

DUANE YOUNGBERG, ETC., ET AL., PETITIONERS *v.*
 NICHOLAS ROMEO, AN INCOMPETENT, BY HIS
 MOTHER AND NEXT FRIEND, PAULA ROMEO

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
 APPEALS FOR THE THIRD CIRCUIT

[June —, 1982]

CHIEF JUSTICE BURGER, concurring in the judgment.

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I agree with the Court that some amount of self-care instruction may be necessary to avoid unreasonable infringement of a mentally-retarded person's interests in safety and freedom from restraint; but it seems clear to me that the Constitution does not otherwise place an affirmative duty on the State to provide any particular kind of training or habilitation—even such as might be encompassed under the essentially standardless rubric "minimally adequate training," to which the Court refers. See *ante*, at 11 and n. 24. Cf. *Ro-*

Supreme Court of the United States
Washington, D. C. 20543CHAMBERS OF
JUSTICE Wm. J. BRENNAN, JR.

May 11, 1982.

No. 80-1429 -- Youngberg v. Romeo.

Dear Lewis,

You have written a fine draft opinion in a very difficult case. My concerns focus on the position taken by respondent at oral argument, which to my mind made unnecessary the extensive discussion of respondent's constitutional rights that you have undertaken.

At pages 9-13 of your draft, you discuss respondent's claim of "a constitutional right to 'habilitation,'" Draft at 9, which leads you into a discussion of Rodriguez and Paul v. Davis. I do not think that this discussion is required, for two reasons. First, at oral argument, respondent withdrew completely from the position taken on this point in Judge Adams' opinion in the Third Circuit, as well as from the position that respondent himself took on this point in his brief filed in this Court: In fact, respondent pointedly refused to defend Judge Adams' opinion to the extent that it "announced a right to treatment in the sense of treatment to achieve maximum potential." Tr. of Oral Arg. 46-47, 48. Rather, he took the position -- which I gather is your own -- that petitioners were only "obligated to use behavioral programming to ... reduce violence and prevent aggressive [behavior]," and that this obligation was "a part of the minimum care that's required." Id., at 47. As a result, why do we need to ascribe to respondent the position that "the State ... has a constitutional duty to provide reasonable training, both to preserve existing skills and develop new ones," Draft at 9? Respondent has given up that posi-

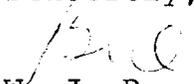
Brennan 8/

tion, and now presses a claim for "habilitation" only to the extent -- again as you suggest -- that such treatment is required to ensure "safe conditions" and to permit "freedom from bodily restraint" to the extent possible.

Second, and particularly significant, I think, respondent took the position in his brief and at oral argument that Pennsylvania law has created "a liberty interest in habilitation." Brief of Respondent 25-29, Tr. of Oral Arg. 36. Indeed, at oral argument I asked respondent, "Well, is it your view that ... the statute ... provides everything that you say constitutionally you're also entitled to?" Ibid. Respondent answered, "Yes, yes," ibid., and then launched into an explanation, irrelevant for our purposes, of why he had not made a statutory claim, id., at 36-37. As a result of respondent's position, is he not right that "there is no need for this Court in this case to decide whether the Constitution of its own force and without regard to state statutory law entitles retarded persons to minimally adequate habilitation when confined in state institutions"? Brief of Respondent 29.

I recall that at Conference some of our colleagues suggested that this field was best left to state experimentation, at least for the time being. That essentially was respondent's position at oral argument, and I see wisdom in it. Moreover, you are following that course in Mills v. Rogers: To be consistent, shouldn't we follow it here too?

Sincerely,


W. J. B., Jr.

Justice Powell.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE Wm. J. BRENNAN, JR.

May 13, 1982

RE: No. 80-1429 Youngberg v. Romeo

Dear Lewis:

Thanks so much for your prompt response to my suggestions in the above.

I suppose my difficulties with this case count for my hope that we could find a way of disposing of it without having to answer how far treatment was constitutionally required. While I am not as sure in my own mind as apparently you are that "the absence of a waiver is clear", I can't say that a reading of the transcript supports a conclusion that he clearly did waive the claim for training. And I might say the same about the brief.

Respondent's basic argument was that what the Pennsylvania statute gave him the Federal Constitution also required. He sought damages for the denial of those claims. I suppose insofar as he relies on the statute he can't succeed because although Pennsylvania has now abolished sovereign immunity, the statute of limitations bars the claim. Hence he has to press the claim on the Constitution. That means I suppose that we'll have to decide what the Constitution gives him. I may finally agree that the Constitution goes no further than your opinion suggests. But I have not yet come to rest on that.

I am returning with thanks your copy of the transcript of the oral argument.

Sincerely,

Bill

Justice Powell

Brennan

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

May 20, 1982.

No. 80-1429 -- Youngberg v. Romeo.

Dear Lewis,

Your draft opinion is a very fine job, and in most respects I find it quite persuasive. My principal concerns focus on Part II-B, Draft at 9-13. You conclude that Part by holding that "involuntarily-committed mentally retarded persons do not have a constitutionally protected liberty interest in training per se." Id., at 13. This holding differs, of course, from the analysis adopted by Chief Judge Seitz in his concurrence in the CA3:

"I believe that [Romeo] has a constitutional right to minimally adequate care and treatment. The existence of a constitutional right to care and treatment is no longer a novel legal proposition. See, e. g., Donaldson v. O'Connor, 493 F.2d 507 (5th Cir. 1974), rev'd on other grounds and remanded, 422 U.S. 563 (1975); Rouse v. Cameron, 373 F.2d 451 (D.C. Cir. 1966). Although the seminal right-to-treatment cases were concerned with the mentally ill, recent cases have extended this right to the mentally retarded. See, e. g., Welsch v. Likins, 550 F.2d 1122 (8th Cir. 1977); Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974)." 644 F. 2d, at 176 (Seitz, C. J., concurring).

You expressly reject this analysis. Draft at 15, n. 29. But my recollection of our Conference discussion is that while no formal vote was taken, a majority of our colleagues were in favor of embracing Chief Judge Seitz's view on this issue, as on the other issues in

the case. If my recollection is accurate, then I would be willing to join that view and so could not join your opinion as Part II-B is currently written. I might add that since petitioners have already conceded that Romeo has a constitutionally protected liberty interest in personal security and freedom from bodily restraint, Draft at 8 & n. 17, this issue -- whether Romeo has a constitutional right to "training," id., at 9 & n. 19 -- seems to be the principal issue remaining in the case.

Of course we had no formal vote at Conference, and our colleagues will doubtless let you have their reaction in due course.

Sincerely,


W. J. B., Jr.

Justice Powell.
Copies to the Conference.

Supreme Court of the United States
Washington, D. C. 20543CHAMBERS OF
JUSTICE Wm. J. BRENNAN, JR.

June 3, 1982.

No. 80-1429 -- Youngberg v. Romeo.

Dear Lewis,

This is a really hard case, but the changes in your most recent draft go pretty far towards meeting my problems. I expect to be able to join, but will be interested in what others may offer in the way of further refinements.

One question: Chief Judge Seitz states at one point in his concurring opinion that "habilitation"

"refers to 'that education, training and care required by retarded individuals to reach their maximum development' It is in this sense that I use the term 'treatment' in this opinion." 644 F. 2d, at 176 (citation omitted, emphasis added).

Your draft states that

"Chief Judge Seitz did not identify or otherwise define--beyond the right to reasonable safety and freedom from physical restraint--the 'minimally adequate care and treatment' that appropriately may be required for this respondent." Draft at 11.

In light of Chief Judge Seitz' statement, do you think that your statement is quite accurate?

Sincerely,


W. J. B., Jr.

Justice Powell.



Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

June 4, 1982

RE: No. 80-1429 Youngberg v. Romeo

Dear Lewis:

Thanks so much for your response. I am content. I'll be happy to join the previewed draft when circulated.

Sincerely,



Justice Powell



Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

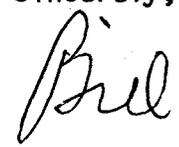
June 7, 1982

RE: No. 80-1429 Youngberg v. Romeo

Dear Lewis:

Please join me in your circulation of June 4.

Sincerely,



Justice Powell

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE Wm. J. BRENNAN, JR.

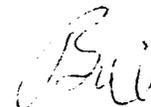
June 15, 1982

RE: No. 80-1429 Youngberg v. Romeo

Dear Harry:

Please join me in your concurring opinion in
the above.

Sincerely,



Justice Blackmun

cc: The Conference

.85 7 12 1982

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

June 7, 1982

Re: 80-1429 - Youngberg v. Romeo

Dear Lewis,

Please join me.

Sincerely yours,



Justice Powell

Copies to the Conference

cpm

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

June 9, 1982

Re: No. 80-1429 - Youngberg v. Romeo

Dear Lewis:

Please join me.

Sincerely, *Stromberg*

T.M.
T.M.

Justice Powell

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

May 24, 1982

Re: No. 80-1429 - Youngberg v. Romeo

Dear Lewis:

My own views for this case coincide with those of Chief Judge Seitz. My notes and recollections may be in error, but I, too, thought that a majority favored the Seitz approach.

Sincerely,



Justice Powell

cc: The Conference

.85 H.A.S. 1112

To: The Chief Justice
 Justice Brennan
 Justice White
 Justice Marshall
 Justice Powell
 Justice Rehnquist
 Justice Stevens
 Justice O'Connor

From: Justice Blackmun

Circulated: JUN 14 1982

Recirculated: _____

No. 80-1429 - Youngberg v. Romeo

JUSTICE BLACKMUN, concurring.

I join the Court's opinion. I write separately, however, to make clear why I believe that opinion properly leaves unresolved two difficult and important issues.

The first is whether the Commonwealth of Pennsylvania could accept respondent for "care and treatment," as it did under the Pennsylvania Mental Health and Mental Retardation Act of 1966, Pa. Stat. Ann., Tit. 50, §4406(b) (Purdon), and then constitutionally refuse to provide him any "treatment," as that term is defined by state law. Were that question properly before us, in my view there would be a serious issue whether, as a matter of due process, the State could so refuse. I therefore do not find that issue to be a "frivolous" one, as THE CHIEF JUSTICE does, post, at 2, n. *.¹

In Jackson v. Indiana, 406 U.S. 715 (1972), this Court, by a

¹See also Garvey, Freedom and Choice in Constitutional Law, 94 Harv. L. Rev. 1756, 1788 (1981); Welsch v. Likins, 550 F.2d 1122 (CA8 1977); Wyatt v. Aderholt, 503 F.2d 1305 (CA5 1974), aff'g sub nom. Wyatt v. Stickney, 325 F. Supp. 781, 785 (MD Ala. 1971).

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Blackmun**

Circulated: _____

Recirculated: JUN 15 1982

Printed
1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 80-1429

DUANE YOUNGBERG, ETC., ET AL., PETITIONERS, v.
NICHOLAS ROMEO, AN INCOMPETENT, BY HIS
MOTHER AND NEXT FRIEND, PAULA ROMEO

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE THIRD CIRCUIT

[June —, 1982]

JUSTICE BLACKMUN, *concurring.* *With whom Justice Brennan joins,*

I join the Court's opinion. I write separately, however, to make clear why I believe that opinion properly leaves unresolved two difficult and important issues.

The first is whether the Commonwealth of Pennsylvania could accept respondent for "care and treatment," as it did under the Pennsylvania Mental Health and Mental Retardation Act of 1966, Pa. Stat. Ann., Tit. 50, § 4406(b) (Purdon), and then constitutionally refuse to provide him any "treatment," as that term is defined by state law. Were that question properly before us, in my view there would be a serious issue whether, as a matter of due process, the State could so refuse. I therefore do not find that issue to be a "frivolous" one, as THE CHIEF JUSTICE does, *post*, at 2, n. *.¹

In *Jackson v. Indiana*, 406 U. S. 715 (1972), this Court, by a unanimous vote of all participating Justices, suggested a constitutional standard for evaluating the conditions of a civilly-committed person's confinement: "At the least, due proc-

¹ See also Garvey, Freedom and Choice in Constitutional Law, 94 Harv. L. Rev. 1756, 1788 (1981); *Welsch v. Likins*, 550 F. 2d 1122 (CA8 1977); *Wyatt v. Aderholt*, 503 F. 2d 1305 (CA5 1974), *aff'g sub nom. Wyatt v. Stickney*, 325 F. Supp. 781, 785 (MD Ala. 1971).

To: The Chief Justice
 Justice Brennan
 Justice White
 Justice Marshall
 Justice Powell
 Justice Rehnquist
 Justice Stevens
 Justice O'Connor

From: **Justice Blackmun**

Circulated: _____

Recirculated: JUN 16 1982

2nd Printed DRAFT

SUPREME COURT OF THE UNITED STATES

No. 80-1429

DUANE YOUNGBERG, ETC., ET AL., PETITIONERS *v.*
 NICHOLAS ROMEO, AN INCOMPETENT, BY HIS
 MOTHER AND NEXT FRIEND, PAULA ROMEO

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
 APPEALS FOR THE THIRD CIRCUIT

[June —, 1982]

JUSTICE BLACKMUN, with whom JUSTICE BRENNAN⁶ and
 JUSTICE O'CONNOR join, concurring.

I join the Court's opinion. I write separately, however, to
 make clear why I believe that opinion properly leaves unre-
 solved two difficult and important issues.

The first is whether the Commonwealth of Pennsylvania
 could accept respondent for "care and treatment," as it did
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 a unanimous vote of all participating Justices, suggested a
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¹ See also Garvey, Freedom and Choice in Constitutional Law, 94 Harv.
 L. Rev. 1756, 1787-1791 (1981); *Welsch v. Likins*, 550 F. 2d 1122, 1126,
 and n. 6 (CA8 1977); *Wyatt v. Aderholt*, 503 F. 2d 1305 (CA5 1974), *affg*
Wyatt v. Stickney, 325 F. Supp. 781, 785 (MD Ala. 1971).

To: The Chief Justice
 Justice Brennan
 Justice White
 Justice Marshall ✓
 Justice Blackmun
 Justice Rehnquist
 Justice Stevens
 Justice O'Connor

From: **Justice Powell**

Circulated: MAY 10 1982

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 80-1429

DUANE YOUNGBERG, ETC., ET AL., PETITIONERS *v.*
 NICHOLAS ROMEO, AN INCOMPETENT, BY HIS
 MOTHER AND NEXT FRIEND, PAULA ROMEO

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
 APPEALS FOR THE THIRD CIRCUIT

[May —, 1982]

JUSTICE POWELL delivered the opinion of the Court.

The question presented is whether respondent, involuntarily committed to a state institution for the mentally retarded, has substantive rights under the Due Process Clause of the Fourteenth Amendment to (i) safe conditions of confinement; (ii) freedom from bodily restraints; and (iii) training or "habilitation."¹ Respondent sued under 42 U. S. C. § 1983 against three administrators of the institution, claiming damages for the alleged breach of his constitutional rights.

I

Respondent Nicholas Romeo is profoundly retarded. Although 33 years old, he has the mental capacity of an eighteen-month old child. He cannot talk and lacks the most basic self-care skills. Until he was 26, respondent lived with his parents in Philadelphia. But after the death of his father

¹The American Psychiatric Association explains that "[t]he word 'habilitation,' . . . is commonly used to refer to programs for the mentally-retarded because mental retardation is . . . a learning disability and training impairment rather than an illness. . . . [T]he principal focus of habilitation is upon training and development of needed skills." Brief of American Psychiatric Association as *Amicus Curiae*, at 4 n. 1.

7, 9, 14, 15, 16

To: The Chief Justice
 Justice Brennan
 Justice White
 Justice Marshall
 Justice Blackmun
 Justice Rehnquist
 Justice Stevens
 Justice O'Connor

From: **Justice Powell**

Circulated: _____

Recirculated: _____

MAY 11 1982

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 80-1429

DUANE YOUNGBERG, ETC., ET AL., PETITIONERS, *v.*
 NICHOLAS ROMEO, AN INCOMPETENT, BY HIS
 MOTHER AND NEXT FRIEND, PAULA ROMEO

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
 APPEALS FOR THE THIRD CIRCUIT

[May —, 1982]

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¹The American Psychiatric Association explains that "[t]he word 'habilitation,' . . . is commonly used to refer to programs for the mentally-retarded because mental retardation is . . . a learning disability and training impairment rather than an illness. . . . [T]he principal focus of habilitation is upon training and development of needed skills." Brief of American Psychiatric Association as *Amicus Curiae*, at 4 n. 1.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

May 12, 1982

80-1429 Youngberg v. Romeo

Dear Bill:

When I returned this morning, I found your letter of May 11. Thank you for writing, and I appreciate your making it a private letter.

I will now try to answer the two questions you raise.

1. I do not think we fairly can say that respondent waived the claim for "habilitation" (training) that clearly was in this case when we granted it. The absence of a waiver is clear, I think, from a reading of the transcript. I send to you with this letter the copy of the transcript that my clerk and I have used in preparing the draft. The critical pages are 46-49. As often happens at oral argument, it is not clear at all that you and Mr. Tiryak were understanding each other. It is clear, I think, that he supported Judge Adams' opinion.

I have again taken a look at respondent's brief. On page 7, he summarizes the three separate holdings of CA3, including "a right to habilitation that was acceptable in light of present medical or other scientific knowledge." At pages 23-28, respondent argues for "an independent constitutional right to minimally adequate habilitation".

Respondent's brief relies expressly on the brief of American Psychiatric Association in which "habilitation" is defined ("the principal focus of habilitation is upon training and development of needed skills" p. 4, fn. 1). Respondent's brief also stated that "the right to minimal adequate habilitation should depend upon the prospect of a cure rather than amelioration of the disabilities of retardation." Respondent, of course, argues that "the Court of Appeals (judgment) should be affirmed".

Brown

2. Your second suggestion is that we follow the course I propose in Mills v. Rogers and remand this case for a determination whether under Pennsylvania law there is a "liberty interest in habilitation". I would hesitate to propose this for several reasons. There are major differences between the two cases. Mills involved a claim to federal procedural protection that could not be decided properly without reference to state substantive law. Some five months after CA1 decided Mills, and after we granted certiorari, the Supreme Judicial Court of Massachusetts decided Roe III. At least on its face, Roe III appears to make a substantial change in Massachusetts law. We remanded Mills to enable CA1 "to determine how Roe III may have changed the law of Massachusetts and how any changes may affect this case". Draft of Mills, p. 14.

The situation in this case is entirely different. We have been advised of no change in Pennsylvania law. The courts below decided the case in light of their understanding of the Pennsylvania statute, as then interpreted. Moreover, the only claim before us in Youngberg is for damages for a violation of a substantive federal right. Respondent's counsel, at oral argument, advised that the damage claim could not have been brought originally as a pendent state-law claim because of the then existing Pennsylvania sovereign immunity law. The damage claim now would be barred by the state statute of limitations. See Tr. Oral Argument, at 36. In Mills, the plaintiffs argued that their claims could be satisfied under Massachusetts law.

Sincerely,

Lewis

Justice Brennan

lfp/ss

May 24, 1982

80-1429 Youngberg v. Romeo

Dear Sandra:

I am recirculating Youngberg this afternoon.

In addition to a few stylistic changes, those made in n. 27 on p. 14, and in the text on p. 18, will - I believe - comply with your suggestion that we make clear that this opinion is consistent with Jackson v. Indiana.

Of course, Jackson has very little to do with this case, as I think the addition in n. 27 makes clear.

I appreciate your bringing this to my attention.

Sincerely,

Justice O'Connor

LFP/vde

To: The Chief Justice
 Justice Brennan
 Justice White
 Justice Marshall ✓
 Justice Blackmun
 Justice Rehnquist
 Justice Stevens
 Justice O'Connor

Changes 8, 14, 18

From: Justice Powell

Circulated: _____

MAY 24 1982

Recirculated: _____

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 80-1429

DUANE YOUNGBERG, ETC., ET AL., PETITIONERS, *v.*
 NICHOLAS ROMEO, AN INCOMPETENT, BY HIS
 MOTHER AND NEXT FRIEND, PAULA ROMEO

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
 APPEALS FOR THE THIRD CIRCUIT

[May —, 1982]

JUSTICE POWELL delivered the opinion of the Court.

The question presented is whether respondent, involuntarily committed to a state institution for the mentally retarded, has substantive rights under the Due Process Clause of the Fourteenth Amendment to (i) safe conditions of confinement; (ii) freedom from bodily restraints; and (iii) training or "habilitation."¹ Respondent sued under 42 U. S. C. § 1983 against three administrators of the institution, claiming damages for the alleged breach of his constitutional rights.

I

Respondent Nicholas Romeo is profoundly retarded. Although 33 years old, he has the mental capacity of an eighteen-month old child. He cannot talk and lacks the most basic self-care skills. Until he was 26, respondent lived with his parents in Philadelphia. But after the death of his father

¹The American Psychiatric Association explains that "[t]he word 'habilitation,' . . . is commonly used to refer to programs for the mentally-retarded because mental retardation is . . . a learning disability and training impairment rather than an illness. . . . [T]he principal focus of habilitation is upon training and development of needed skills." Brief of American Psychiatric Association as *Amicus Curiae*, at 4 n. 1.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

May 25, 1982

80-1429 Youngberg v. Romeo

Dear Bill:

I have not overlooked replying to your letter of May 20. I had to speak at Washington & Lee University on Friday, and generally am behind in my opinion work.

I also agree largely with Chief Judge Seitz, and had not thought that my draft opinion departed substantially from his view. I will, however, take another careful look and be in touch with you.

Sincerely,



Justice Brennan

Copies to the Conference

LFP/vde

.85 MAY 22 1982

Supreme Court of the United States
Washington, D. C. 20543

80-1429

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

June 2, 1982

Dear Bill:

I am delivering a fourth draft of Youngberg in view of your kindness in being willing to take a precirculation look at it.

Our correspondence has prompted me to make substantial changes on page 8 and 9, and particularly pp. 10-16. As you will see, I have - as you suggested - drawn primarily on Chief Judge Seitz's opinion. Further consideration of the case also persuades me that I was trying to write too broadly. In this case, in view of Romeo's extremely unfortunate condition, he can never be released from an institution and the minimally adequate training that he seeks is related to his safety (from self abuse as well as by others), and to minimize physical restraints. No other specific training is sought in his complaint.

In sum, my opinion as revised decides this case only, and on its rather special facts. I have left open the question of what type of training may be appropriate in other cases.

Sincerely,



Justice Brennan

lfp/ss



Footnotes 19 on renumbered.
I Stylistic changes only: 2, 4, 7, 17
II Substantive changes: 8, 9, 10-16

Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Rehnquist
Justice Stevens
Justice O'Connor

circulated
6/2
1.30 P.M.

From: Justice Powell

Circulated: _____

Recirculated: _____

4th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 80-1429

DUANE YOUNGBERG, ETC., ET AL., PETITIONERS, v.
NICHOLAS ROMEO, AN INCOMPETENT, BY HIS
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[May —, 1982]

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Respondent Nicholas Romeo is profoundly retarded. Although 33 years old, he has the mental capacity of an eighteen-month old child. He cannot talk and lacks the most basic self-care skills. Until he was 26, respondent lived with his parents in Philadelphia. But after the death of his father in May 1974, his mother was unable to care for him. Within

¹The American Psychiatric Association explains that "[t]he word 'habilitation,' . . . is commonly used to refer to programs for the mentally-retarded because mental retardation is . . . a learning disability and training impairment rather than an illness. . . . [T]he principal focus of habilitation is upon training and development of needed skills." Brief of American Psychiatric Association as *Amicus Curiae*, at 4, n. 1.

attached to L.P. 6/2/82

June 4, 1982

80-1429 Younberger v. Romeo

Dear Harry:

The substantial changes I have made in this case are responsive to the concerns Bill Brennan expressed, and which you also wrote me about.

The opinion now focuses narrowly on the facts of this most pathetic case, and leaves broader questions for another day.

Sincerely,

Justice Blackmun

lfp/ss

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

June 4, 1982

80-1429 Youngberg v. Romeo

Dear Bill:

It was typically good of you to review my uncirculated draft in this tiresome case.

Chief Judge Seitz's language, that you quote, comes in the preliminary part of his opinion, prior to his considering the claim presented by respondent in this case. He quoted the broad psychiatric definition of "habilitation", used in some of the amici briefs, after emphasizing the difference "between the mentally ill and the mentally retarded". He did relate his use of the term "treatment" (synonymous in this case with "training") to the general definition.

Several pages later (*id.*, at 181) Chief Judge Seitz addressed the merits of respondent's treatment claim. His earlier generalized definition was not a holding with respect to respondent. When he considered the merits, he did not identify any specific treatment beyond those considered in my draft opinion. In view of Romeo's condition, the allegations of his complaint, and the purpose of his commitment, I think it is appropriate - perhaps necessary - that we decide this case narrowly on its facts as I have tried to do. No doubt other, and more difficult cases, will come to us later.

What do you think?

Sincerely,

Lewis

Justice Brennan

lfp/ss

Brennan J

To: The Chief Justice
 Justice Brennan
 Justice White
 Justice Marshall ✓
 Justice Blackmun
 Justice Rehnquist
 Justice Stevens
 Justice O'Connor

From: Justice Powell

Circulated: _____

Recirculated: ~~MAY 4~~ 1982

Footnotes 19 on renumbered.

- I Stylistic changes only: 2, 4, 7, 17
 II Substantive changes: 8, 9, 10-16

4th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 80-1429

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Respondent Nicholas Romeo is profoundly retarded. Although 33 years old, he has the mental capacity of an eighteen-month old child. He cannot talk and lacks the most basic self-care skills. Until he was 26, respondent lived with his parents in Philadelphia. But after the death of his father in May 1974, his mother was unable to care for him. Within

¹The American Psychiatric Association explains that "[t]he word 'habilitation,' . . . is commonly used to refer to programs for the mentally-retarded because mental retardation is . . . a learning disability and training impairment rather than an illness. . . . [T]he principal focus of habilitation is upon training and development of needed skills." Brief of American Psychiatric Association as *Amicus Curiae*, at 4, n. 1.

June 9, 1982

80-1429 Youngberg v. Romeo

Dear Chief:

This is in response to your letter of June 8.

First, the "right to minimally adequate training" is taken directly from Chief Judge Seitz's opinion. According to my notes, you, Bill Brennan, Byron, Harry, John and I all said that we agreed generally with Seitz.

When I circulated a first draft on May 10 with the standard that you prefer, only Bill Rehnquist joined. I received letters from WJB and HAB reminding me of the Conference vote. Accordingly, I have used this general Seitz formulation. It is less specific than other language used by Seitz. Indeed, "minimally adequate training" is about as low a requirement as one can write. Surely, there is a duty to provide minimum self-care training for a person like Romeo.

Your second point suggests that clarification is needed with respect to "professional judgment". In my view, the present language is the strength of the opinion. The court below held that the test would be care in accordance with generally accepted or prevailing professional judgment. This means outside experts could testify, just as occurs in a malpractice case. The way my opinion is written, professionals within the institution decide the requisite care.

Thirdly, you suggest that the case need not be remanded. Your vote, as well as that of a clear majority, was to reverse and remand. I do think a footnote should be added that refers to the giving of the erroneous "deliberate indifference" instruction. Also, expert testimony was excluded that clearly should have been admitted. See n. 30.

I am afraid Romeo is "incarcerated" for life. You are quite right, however, that the term is inappropriate.

As to n. 19, p. 9, the reference to "federal substantive right" is merely a claim by respondent. The note simply says that we do not address the claim.

In sum, I personally liked my first draft because it would have resolved more issues and - as you suggest - given more specific guidance. But I had no support for it from anyone except Bill Rehnquist. Footnote 24, p. 11, assures, however, that an "indentifiable liberty interest" must be found to support any particular type of training. The training approved in my opinion is limited to that related to the established liberty interests of safety and freedom from undue restraint.

This means there will be other cases. But this is the way the system works.

Sincerely,

The Chief Justice

lfp/ss

Changes: 1, 2, 4, 5, 8, 10, 14.

New footnote 11.

Old footnote 18 deleted.

} Footnotes
in between
renumbered.

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall ✓
Justice Blackmun
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: Justice Powell

Circulated: _____

Recirculated: JUN 10 1982

5th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 80-1429

DUANE YOUNGBERG, ETC., ET AL., PETITIONERS, v.
NICHOLAS ROMEO, AN INCOMPETENT, BY HIS
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APPEALS FOR THE THIRD CIRCUIT

[June —, 1982]

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I

Respondent Nicholas Romeo is profoundly retarded. Although 33 years old, he has the mental capacity of an eighteen-month old child, with an I.Q. between 8 and 10. He cannot talk and lacks the most basic self-care skills. Until he was 26, respondent lived with his parents in Philadelphia. But after the death of his father in May 1974, his mother was

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11, 16

To: The Chief Justice
 Justice Brennan
 Justice White
 Justice Marshall ✓
 Justice Blackmun
 Justice Rehnquist
 Justice Stevens
 Justice O'Connor

From: **Justice Powell**

Circulated: _____

Recirculated: JUN 14 1982

6th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 80-1429

DUANE YOUNGBERG, ETC., ET AL., PETITIONERS, *v.*
 NICHOLAS ROMEO, AN INCOMPETENT, BY HIS
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[June —, 1982]

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The question presented is whether respondent, involuntarily committed to a state institution for the mentally retarded, has substantive rights under the Due Process Clause of the Fourteenth Amendment to (i) safe conditions of confinement; (ii) freedom from bodily restraints; and (iii) training or "habilitation."¹ Respondent sued under 42 U. S. C. § 1983 three administrators of the institution, claiming damages for the alleged breach of his constitutional rights.

I

Respondent Nicholas Romeo is profoundly retarded. Although 33 years old, he has the mental capacity of an eighteen-month old child, with an I.Q. between 8 and 10. He cannot talk and lacks the most basic self-care skills. Until he was 26, respondent lived with his parents in Philadelphia. But after the death of his father in May 1974, his mother was

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

June 22, 1982

80-1699, Plante v. Scott,
Heretofore held for No. 80-1429, Youngberg v. Romeo

MEMORANDUM TO THE CONFERENCE:

Plante v. Scott is a case from the CA3 and is reported at 641 F. 2d 117 (CA3 1981) (Gibbons, Weis and Sloviter). Scott, who is mentally ill, has been involuntarily committed for 25 years following his indictment for the murder of his grandmother.

The first issue presented in the petition is whether the CA3 erred in applying its decision in Romeo to hold that Scott is entitled to adequate medical treatment, including psychiatric treatment, in the "least restrictive environment." Although Romeo does not address whether the criminally insane have a right to psychiatric treatment, it does provide a ground for GVR'g on the "least restrictive environment" portion of the the CA3's holding. In Romeo, the Court clearly rejected the CA3's "least restrictive" standard and adopted a standard of reasonableness, giving deference to professional judgments.

A GVR on Romeo may only postpone this Court's consideration of whether the criminally insane, committed to protect others, have a right to "adequate psychiatric treatment." Further consideration of this issue by the CA3 in light of Romeo, however, may give this Court greater guidance in the event the right-to-psychiatric-treatment issue returns. On remand, the CA3 will no longer be able to rely on its decision in Romeo and may consider more carefully the constitutional basis for any right to psychiatric treatment enjoyed by Scott.

The second issue raised in the Scott petition is whether the CA erred in remanding for an injunction to ensure that Scott receives adequate care in the future, given that the relief requested by Scott includes the construction of a new facility. There is no need, however, for the Court to reach this issue at this interlocutory point in the litigation. No injunction has, as yet, issued, and the CA3 did not hold that the DC must order construction of a new facility.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

May 14, 1982

Re: No. 80-1429 Youngberg v. Romeo

Dear Lewis:

Please join me.

Sincerely,



Justice Powell

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

June 7, 1982

Re: 80-1429 - Youngberg v. Romeo

Dear Lewis:

If you can eliminate two sentences, neither of which is necessary to the decision, I will join your opinion.

First, in footnote 18 you state that the Eighth Amendment "has no direct bearing on nonpenal institutions." Surely that statement is much broader than necessary because persons convicted of crimes may be kept in nonpenal institutions, at least temporarily, and, I should think, a state might provide for a system of punishment within a mental institution. Rather than trying to sort out the possible refinements, could we not simply omit the footnote.

Second, on page 14 you state that the professional judgment standard is higher than the deliberate indifference formulation applied in the context of penal institutions citing Estelle v. Gamble. Again, could we not omit this sentence. Its only purpose, as I would interpret it, would be to lower the standard applicable in prisons. I should think a failure to meet the professional judgment standard in a prison context would almost invariably constitute deliberate indifference. Even if the Court disagrees, I see no reason to endeavor to be this precise because in either context, it is clear that the standard is lower than a common law malpractice standard.

-2-

If you can make these two changes, I will join your opinion.

Respectfully,

A handwritten signature in black ink, appearing to be 'J.P.', written in a cursive style.

Justice Powell

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

June 8, 1982

Re: 80-1429 - Youngberg v. Romeo

Dear Lewis:

Please join me.

Respectfully,



Justice Powell

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

May 20, 1982

No. 80-1429 Youngberg v. Romeo

Dear Lewis,

I generally agree with your excellent handling of the right-to-treatment claim. I am concerned about an issue which is not directly discussed.

In Jackson v. Indiana, 406 U.S. 715, 738 (1972), the Court held that, at a minimum, due process requires some rational relation between the nature of a mental health commitment and its purpose. In the present case, Pennsylvania has agreed to commit and care for Romeo because he cannot take care of himself, and his mother is also unable to do so. The purpose of his commitment, as I understand it, is to provide some reasonable degree of care, safety, and limited freedom of movement within the institution. Yet, if, as a result of the care and treatment or lack thereof, in the institution, he loses some of the basic skills he had on commitment, he will have lost what little "liberty" he had left.

Absent reasonable care and training, necessary in the judgment of professionals charged with his care, the nature of Romeo's confinement may not be rationally related to the purpose of his confinement. This concept may fit comfortably within your conclusion that the respondent is entitled to "reasonably non-restrictive confinement conditions."

If you think you would be willing to address this problem in your opinion, I would hope to join. Otherwise, I may decide I should write something separately to address it.

Sincerely,

Sandra

Justice Powell

substantially
Add ~~the~~ *the* language
& say that our holdings
require training ~~to~~
~~to~~ improve his safety &
~~his~~ *his* ability to freedom w/in
the institution.

✓
Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

June 7, 1982

No. 80-1429 Youngberg v. Romeo

Dear Lewis,

Please join me in the 4th draft of your
opinion of the Court.

Sincerely,



Justice Powell

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

June 15, 1982

No. 80-1429 Youngberg v. Romeo

Dear Harry,

Please join me in your concurring opinion.

Sincerely,



Justice Blackmun

Copies to the Conference

.85 JUN 12 6 33 PM '82